IN THE SUPREME COURT OF FLORIDA

JACK A. GRIFFITH
Petitioner,

v.

FLORIDA PAROLE AND PROBATION COMMISSION,
Respondent.

CASE NO: 66,742

INITIAL BRIEF OF PETITIONER

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Statement of the Case and Statement of the Facts

The case is before the Court on the certified question:

> Did the enactment of Chapter 83-78, Laws of Florida, terminate Section 120.68 appeals by prisoners from Florida Parole and Probation final action pertaining to presumptive parole release dates where such appeals had not been determined on the effective date of that legislative act?

ARGUMENT

DID THE ENACTMENT OF CHAPTER 83-78, LAWS OF FLORIDA, TERMINATE SECTION 120.68 APPEALS BY PRISONERS FROM FLORIDA PAROLE AND PROBATION FINAL ACTION PERTAINING TO PRESUMPTIVE PAROLE RELEASE DATES WHERE SUCH APPEALS HAD NOT BEEN DETERMINED ON THE EFFECTIVE DATE OF THAT LEGISLATIVE ACT?

For the reasons and reasoning set forth below Petitioner suggests the correct answer to the above certified question is "negative."

The statute 83-78 Laws of Florida, provides:

> Prisoners as defined in s. 944.02(5) may obtain or participate in proceedings under s. 120.54(3), (4), (5), or (9), or s. 120.56 and may be parties under s. 120.68 to seek judicial review of those proceedings. Prisoners shall not be considered parties in any other proceedings and may not seek judicial review under s. 120.68 of any other agency action. Parolees shall not be considered parties for purposes of agency action or judicial review when the proceedings relate to the rescission or revocation of parole.

Generally decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since time of trial. Wheeler v. State, 344 So.2d 244 (Fla.1977), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979); Lowe v. Price, 437 So.2d 142 (Fla.1983). But a recognized exception is that when parties act in reliance on, and in conformity with the prior construction of an appellate court, the rights which such parties have gained and the positions they have so taken should not be impaired by a different judicial construction of the same rule or statute made in a subsequent decision of that court. See Fuller v. Riley, 124 So.2d 499 (Fla.3d DLA 1960), at 500; Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla1944), at 253.

> Based upon a recognition of this common-sense exception to the rule, some of the courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Accordingly, such courts have given to such overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment. See State ex rel. Midwest Pipe & Supply Co. v. Haid, 330 Mo. 1093, 52 S.W.2d 183; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L.Ed. 520; Douglass v. Pike County, 101 U.S. 677, 687, 25 L. Ed. 968; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S.W. 944. See also Culpepper v. Culpepper, 147 Fla. 632, 3 So.2d 330. (emphasis added).

The derivation of the statutory construction theory has a lengthy history, United States v. Schooner Peggy, 1 Cranch 103, 2 LEd 49 (1801)

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional ... I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns ... the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." [J. Marshall] (footnote omitted).

In the wake of Schooner Peggy, it remained unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in Schooner Peggy, or conversely, whether such a change in the law must be given effect unless there was clear indication that it was not to apply in pending cases.

For a very long time the Supreme Court decisions did little to clarify this issue. See Bradley v. School Board of City of Richmond, 416 U.S. 696, at 713, n.17; 94 S.Ct. 2006, at 2017, n.17; 40 L.Ed.2d 476 (1974).

In Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 89 S. Ct. 518, 21 L. Ed.2d 474 (1969), the broader reading of Schooner Peggy was adopted, and the United States Supreme Court ruled that "an appellate court must apply the law in effect at the time it renders its decision." Id., at 281, 89 S.Ct., at 526. The Court recited the language in Schooner Peggy, quoted above, and noted that that reasoning "has been applied where the change was constitutional, statutory, or judicial," 393 U.S., at 282, 89 S.Ct., at 526 (footnotes omitted), and that it must apply "with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." Ibid. Thorpe thus stands for the proposition that even where the interviewing law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect. Bradley v. School Board, supra, 416 U.S. at 715, 94 S.Ct., at 2018.

The Court in Thorpe, however, observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice," citing Greene v. United States, 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964). Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in Schooner Peggy suggested that such injustice could result "in mere private cases between individuals," and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." 1 Cranch, at 110, 2 L.Ed. 49. Bradley v. School

Board, supra, 416 U.S., at 717, 94 S.Ct., at 2017. See also State v. Lee 286 So.2d 596 (Fla. 1st DCA 1973), at 600.

It is submitted that the presently vested and perfected right to judicial review by those prisoners who have PPRD's and who have appeals pending should be heard to prevent a manifest injustice, where a prisoner is now immediately eligible for parole release, but for judicial enunciation of the right to freedom, immediate intervention and relief should be forthcoming. Cf. U.S. v. Ferri, 652 F.2d 325 (3d Cir. 1981), at 328, and cases cited. See also, Dinsmore v. Southern Express Co., 183 U.S. 115, 22 S.Ct., 45 (1901); Stephens v. Cherokee Nation, 174 U.S. 445, 19 S.Ct 722 (1899). The nature of the concerns relative to working an injustice center upon:

a. The nature and identity of the parties.

b. The nature of their rights.

c. The nature of the impact of the change in law upon those rights. Bradley v. School Board, supra, 716 U.S. at 717, 94 S.Ct. 2019.

These concerns are present in the pending appeal cases.

CONCLUSION

To prevent manifest injustice, particularly to those inmates with valid claims which would entitle them to immediate release, the standing appeals should be considered. The criteria under law is satisfied in these cases. The relief sought would be consideration of the merits of those perfected pending appeals in the name class as Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Doris E. Jenkins, Esq., Florida Parole and Probation Commission, 1309 Winewood Blvd., Bldg. 6, Tallahassee, Florida 32301, by mail this 10 day of April, 1985.

Respectfully Submitted.

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